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No. 90-1736

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

AMERICAN SOCIETY OF PLASTIC AND RECONSTRUCTIVE SURGEONS, INC. AND ROBERT M. GOLDWYN, M.D.,

Petitioners,

v.

CELIA ANDERSON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UTAH SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER STATEMENT OF FACTS

Respondent does not seek to burden the court with her own detailed statement of the facts. Respondent does wish to clarify certain facts which have either been omitted or are not apparent from the petitioners' statement.

1. The Utah Supreme Court did not rule that the American Society of Plastic and Reconstructive Surgeons (hereinafter "ASPRS") and Robert M. Goldwyn, M.D. (hereinafter "Goldwyn") were subject to personal jurisdiction in Utah. The Utah court ruled only that the facts necessary to a determination of the jurisdiction issue were so intertwined with the merits of the plaintiff's claims that the jurisdictional issue should be determined at trial. *Anderson v. American Society of Plastic and Reconstructive Surgeons*, 148 Utah Adv. Rep. 3, 5 (Nov. 1990) (see Appendix to Petition).

2. The statement of facts contained in the Petition for Writ of Certiorari contains many disputed factual statements. The petitioners' fact statement does not accurately set forth the facts as required by Supreme Court Rule 14.5 because it assumes petitioners' version of the facts is correct. There is conflicting evidence in the record from which a factfinder could reasonably find the facts to be as set forth in the following paragraphs.

3. Dow Corning Corporation ("Dow Corning") tested liquid silicone for over ten years from 1965 to 1975.

4. In 1975, the FDA approved liquid silicone for the most severe cases of facial deformity. Dow Corning elected not to market silicone under those restrictions.

5. The plastic surgeon community (principal users of silicone) was upset at the lack of availability of silicone. The ASPRS, on behalf of the plastic surgeon community, approached Dow Corning to devise a plan to make liquid silicone available to selected plastic surgeons.

6. Petitioners have incorrectly argued that the silicone injection study was sponsored by Dow Corning. (Petitioners' Brief at 3.) In fact, the study was jointly sponsored by Dow Corning and the ASPRS.

7. Dow Corning and the ASPRS agreed to jointly sponsor a new study of liquid silicone. Dow Corning and the ASPRS agreed that Dow Corning would supply the silicone and the ASPRS would provide investigators and a medical monitor for the experiment. Dow Corning and the ASPRS agreed to jointly pay the expenses of the monitor, jointly exercise control over documents used in the study, and jointly agree on all documents to be used in the study. All major aspects of the study were to be handled jointly. In

effect, Dow Corning and the ASPRS were partners in conducting the study.

8. Dr. Goldwyn agreed to be the medical monitor at the request of the ASPRS (of which his is a member). Dr. Goldwyn agreed to assist in training the investigators; to approve the admission of each patient into the study; to answer inquires as to problems of investigators; to assist in preparing reports to the FDA; to review all submissions to the FDA regarding safety or efficacy of silicone; and to be the initial contact for any complications from injection of silicone.

9. Dr. Goldwyn prepared the consent form signed by Celia Anderson. Dr. Goldwyn had the duty to assure that Dr. Woolf, Celia Anderson's treating doctor, was fully trained in his obligations as an investigator. Dr. Goldwyn had a duty to assure that Dr. Woolf followed the protocol.

10. Only Dr. Goldwyn could finalize Celia Anderson's entry into the silicone study program. Only Dr. Goldwyn could authorize Celia Anderson's injection with liquid silicone. Dr. Goldwyn knew Celia Anderson lived in Utah and would be injected with liquid silicone in Utah. If injuries were to result from the injections, Dr. Goldwyn and the ASPRS knew these injuries would occur in Utah.

11. Dr. Goldwyn reviewed Celia Anderson's medical records and diagnosed severe lipodystrophy. He then specifically approved injections of liquid silicone into Celia Anderson's body in the State of Utah.

12. After Celia Anderson's adverse reactions to the silicone, Dr. Woolf consulted continually with Dr. Goldwyn on Celia Anderson's treatment. When Dr. Woolf was replaced by Dr. Leonard as treating physician, Dr. Leonard was then in contact with Dr. Goldwyn regarding treatment.

13. Petitioners have incorrectly argued that the ASPRS had no responsibility or control over the liquid silicone study. (Petitioners' Brief at 5-6). The ASPRS in fact exercised joint control over the silicone study. The ASPRS selected the monitor and the investigators, drafted the consent form and "policed" the study. The ASPRS represented themselves as a co-sponsor or joint-sponsor. The ASPRS assisted in selecting Utah as a site for experiments. The president of the ASPRS at the time, Dr. Peterson, specifically selected Salt Lake City, Utah.

14. Petitioners have incorrectly argued that Dr. Goldwyn had no contacts and transacted no business in Utah. (Petitioners' Brief at 6). Dr. Goldwyn agreed to act as the medical monitor for a national experimental study. He agreed to screen all patients proposed for the study to assure

that they met the study protocols. Dr. Goldwyn had final responsibility for accepting a patient into the study. He knew the patients would reside in other states. Dr. Goldwyn knew Utah was one of the areas where the study would be carried out and patients would be injected. Dr. Goldwyn drafted the consent form for use in the study. Dr. Woolf, a Utah doctor, was chosen to inject the silicone in Utah. The ASPRS and Dr. Goldwyn knew the consent form they had drafted would be used in Utah by a Utah doctor to explain silicone injections to Utah patients. Dr. Goldwyn knew he would be approving experimental injections of silicone in Utah when he became monitor of the experiment. Dr. Goldwyn knew the consent form he helped draft would be used in Utah. Finally, Dr. Goldwyn oversaw the training of Dr. Woolf, a Utah doctor, in how to inject the silicone.

15. Celia Anderson suffered a severe chronic inflammatory reaction to the liquid silicone. The risk of such a reaction was well know to Dow Corning and the ASPRS, but the risk was not disclosed to Celia Anderson.

16. The ineffectiveness of surgical removal was admitted by Dow Corning to the FDA. It is impossible to remove all the injected silicone, and the body continues to react to the silicone left after surgery. Of course, surgical removal may leave severely disfiguring scars or require restoration of the

removed tissue by skin grafts. This is not explained in the consent form. The consent form implies that the injected silicone can be removed by needle (aspiration). The parties agree that is impossible.

17. Celia Anderson did not in fact have severe lipodystrophy. Her condition was misdiagnosed by Dr. Woolf and Dr. Goldwyn. Celia Anderson was never a proper candidate for injection of liquid silicone. Celia Anderson was admitted to the program in violation of the protocols.

18. The ASPRS shares liability jointly with Dow Corning and Dr. Goldwyn for improperly injecting Celia Anderson with silicone. Both the ASPRS and Goldwyn knew the experiments would be done in Utah, agreed to have Celia Anderson injected in Utah, knew that if there was damage or liability from injections, it would occur in Utah. The ASPRS and Dr. Goldwyn voluntarily came to Utah with their study. They have knowingly entered the state for jurisdictional purposes.

REASONS FOR DENYING CERTIORARI

The Utah Supreme court has not ruled that the contacts of Dr. Goldwyn and the ASPRS are sufficient to support *in personam* jurisdiction in Utah. The Utah Supreme Court only ruled that the facts which determine the jurisdictional issues are the same facts which determine the merits of Celia

Anderson's claims against the ASPRS and Dr. Goldwyn. It is reasonable to require that the jurisdiction question be determined on the evidence produced at trial. The factual disputes related to jurisdiction will be determined at the same time as the factual issues on liability.

No due process rules were ignored or rejected by the Supreme Court in remanding the case to the trial court for determination of the factual issues related to *in personam* jurisdiction. For this reason, the Petition for Writ of Certiorari should be denied.

ARGUMENT

I. THE UTAH SUPREME COURT PROPERLY DETERMINED THAT THE DISTRICT COURT HAS JURISDICTION TO DETERMINE ITS JURISDICTION BY PROCEEDING TO A DECISION ON THE MERITS

Unless this court is inclined to revisit and overrule *Land v. Dollar*, 330 U.S. 731 (1947), there is no reason to grant petitioners' request for a Writ of Certiorari in this case.

In *Land v. Dollar*, *supra*, this court held that when the question of jurisdiction is intertwined with the merits of the plaintiff's claim, a trial on the merits is a proper method for determining the question of jurisdiction. The Court stated:

> We intimate no opinion on the merits of the controversy. We only hold that the district court has jurisdiction to determine its jurisdiction by proceeding to a decision on the merits.

330 U.S. at 739.

This Court had previously determined that the mode of determining the issue of jurisdiction is left to the discretion of the trial court. *Gibbs v. Buck*, 307 U.S. 66 (1939).

Following the decisions in *Land v. Dollar*, *supra*, and *Gibbs v. Buck*, *supra*, the circuit courts have consistently followed the proposition that a trial court has the discretion to determine how the question of jurisdiction should be decided. *E.g.*, *Ten Mile Industrial Park v. Western Plains Service Corp.*, 810 F.2d 1518, 1524 (10th Cir. 1987); *Schramm v. Oakes*, 352 F.2d 143, 149 (10th Cir. 1965); *Wade v. Rogala*, 270 F.2d 280, 285 (3rd Cir. 1959); *Fireman's Fund Insurance Co. v. Railway Express Agency*, 253 F.2d 780, 784 (6th Cir. 1958).

Relying on *Land v. Dollar*, *supra*, the Tenth Circuit Court of Appeals stated in *Schramm v. Oakes* that where jurisdictional facts depend upon a decision on the merits:

> In that circumstance, the trial court should determine jurisdiction by proceeding to a decision on the merits. The purpose of postponing a determination upon a jurisdictional question when it is tied to the actual merits of the case is to prevent a summary decision on the merits without the ordinary incidents of a trial including the right to a jury. (Citations omitted).

352 F.2d at 149.

The decision of the Utah Supreme Court, in this case, adopted the holdings of the federal courts as set forth in *Land v. Dollar*, *supra*; *Gibbs v. Buck*, *supra*; and *Schramm v. Oakes*, *supra*. The Utah Court stated:

> Whether defendants caused injury to Anderson [and are thus subject to personal jurisdiction in Utah] is the central question on the merits of her claims. She is entitled to have a jury answer that question if she produces sufficient evidence.

148 Utah Adv. Rep. at 4.

The Utah Supreme Court's holding is identical to this court's holding in *Land v. Dollar*, i.e., the district court may hold a trial on the merits to determine jurisdictional questions. 330 U.S. at 739. *See*, *Schramm v. Oakes*, 352 F.2d at 149. The Utah Supreme Court stated it thus:

> Balancing all of the competing interests, we hold that it is fair to require defendants to subject themselves to trial in a Utah court for the purpose of determining whether Anderson can prove jurisdiction and hence liability (namely, that defendant caused her injury and damages).
>
> We vacate dismissal and remand to the trial court for trial on the merits. Because the facts supporting jurisdiction overlap the facts supporting liability, the trial court must allow defendants to renew their motion to dismiss for lack of jurisdiction at the close of Anderson's evidence.

148 Utah Adv. Rep. at 5.

Thus, the holding of the Utah Supreme Court is squarely in line with case law of this court as set forth in *Land v. Dollar, supra*. Unless this court intends to revisit its holding in *Land v. Dollar*, there is no basis for granting certiorari in this case.

CONCLUSION

Petitioners' claim that Utah's requirement that a non-resident medical association and one of its members go to trial to determine the issue of *in personam* jurisdiction does not violate due process.

This court has historically allowed a district court to determine the issue of jurisdiction at trial when the question of jurisdiction is dependent upon a decision on the merits. Thus, the petition for certiorari should be denied.

Respectfully Submitted,

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